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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Review of the Commission's Regulations Governing Television Broadcasting | ) | MM Docket No. 91-221 |
| | ) | |
| Television Satellite Stations Review of Policy and Rules | ) | |

TO: The Commission

## COMMENTS OF GRANITE BROADCASTING CORPORATION

Granite Broadcasting Corporation and its wholly owned broadcasting subsidiaries ("Granite"),[1] by their attorneys, hereby submit comments in response to the Second Further Notice of Proposed Rule Making ("Second Notice") adopted by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned rule making proceeding.[2] In light of statutory changes made in the Telecommunications Act of 1996 (the "Act"), the Second Notice requests comments on proposed modifications to the Commission's local television ownership rule, radio-television cross-ownership rule and a proposed

[1] Since its founding in 1988, Granite Broadcasting Corporation has become the largest minority controlled television group owner in the U.S. Directly and through subsidiaries, it owns and operates the following ten television stations: KNTV(TV), San Jose, California; WTVH-TV, Syracuse, New York; KSEE(TV), Fresno, California; WPTA(TV), Fort Wayne, Indiana; WEEK-TV, Peoria, Illinois; KBJR-TV, Duluth, Minnesota; KEYE, Austin, Texas; WWMT, Kalamazoo, Michigan; WKBW, Buffalo, New York, and WXON-TV, Detroit, Michigan.

[2] Second Further Notice of Proposed Rule Making, (FCC 96-438) ___ F.C.C. Rcd ___ (released November 7, 1996) (hereinafter "Second Notice").



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grandfathering policy for local marketing agreements ("LMAs"). Granite respectfully submits comments on proposed revisions to the local television ownership rule.

The Commission's local television ownership rule presently prohibits common ownership of two television stations whose Grade B signal contours overlap. In its Second Notice, however, the Commission proposes to narrow the geographic scope of the duopoly rule by permitting common ownership of television stations in different Designated Market Areas ("DMAs") as long as their Grade A signal contours do not overlap. This suggested revision would relax restrictions on common ownership of television stations in the same market, and is intended to reflect the fundamental changes that have occurred in the local video market since the rules were first adopted by the FCC.

Granite believes that changes in the marketplace have occurred since the FCC adopted its television duopoly rule which warrant further relaxation of the rule. Specifically, Granite supports granting an exemption under the local television duopoly rule for either common ownership of a local UHF station and another UHF or VHF station (hereinafter referred to as a "UHF-based" combination) in the same DMA with overlapping Grade A contours. In addition, Granite urges the FCC to adopt waiver criteria which permit television combinations when the market has a sufficient number of independent competing voices to ensure diversity, and when the public interest will be served by the ownership combination.

## I. THE COMMISSION'S TELEVISION DUOPOLY RULE SHOULD CONTAIN A GENERAL EXEMPTION WHICH PERMITS COMMON OWNERSHIP, OPERATION AND CONTROL OF A UHF/UHF OR UHF/VHF STATION COMBINATION

The Second Notice asks whether local television station combinations involving UHF stations should be regulated differently than those involving VHF stations. Granite believes that the Commission must answer this question in the affirmative and adopt a general UHF-based exception to its television duopoly rule. Failure to establish such an exemption would result in an overly restrictive and inequitable rule which would further handicap many UHF stations and undermine their ability to compete against other local and national media.

A. Relaxation of the Duopoly Rule to Permit a UHF-Based Exemption Would Not Undermine the Commission's Policy Goals

The Commission has stated that its purpose in maintaining the duopoly rule is: (1) to promote program and viewpoint diversity; and (2) to foster the competitive operation of broadcast television program distribution and advertising markets.[3] Permitting UHF-based combinations will not undermine either of these policy goals. When the television duopoly rule was first adopted over 30 years ago, it was designed to protect independent stations from anti-competitive practices in local markets which, at the time, had no more than three network affiliates. Over the course of the last few decades, however, the composition of and competition within the video programming market has increased dramatically. To begin with, several new networks, including Fox, UPN and WB Networks, have established themselves in the local television marketplace. Furthermore, commercial television broadcasters now effectively compete in the "local" market not only with each other, but also with a plethora of video news and entertainment services such as cable system operators, wireless cable operators and direct broadcast satellite service operators. These numerous video program providers compete for audience and advertising revenues in all but the smallest markets. The steady growth in the number of video programming sources has

[3] See Second Notice at ¶ 7.

fundamentally changed the market environment for which the television duopoly rule was initially designed. Further deregulation ushered in by the Act only promises to bring more competitors to the table.[4] As the number of video programming providers within the industry steadily grows, it becomes increasingly more difficult, if not virtually impossible, for a single entity to exercise undue influence over program distribution and diversity, and advertising rates.

UHF-UHF and UHF-VHF combinations will experience significant difficulties exercising undue influence in a local market. Given the numerous technical and financial handicaps faced by UHF licensees,[5] a UHF-UHF or a UHF-VHF combination is unlikely to wield sufficient economic power to unilaterally distort advertising rates or create other anti-competitive effects in the market. In fact, in this increasingly competitive environment, some UHF stations, which are typically the technically and economically weakest television stations in the market, may remain viable only by consolidating ownership or operation with another local television station. As such, permitting these combinations will promote rather than undermine competition.

### B. UHF Television Stations Experience Technical and Operational Disparities Which Require Special Consideration Under the Duopoly Rule

VHF stations continue to have a significant competitive and technical advantage over UHF stations because the more limited signal coverage of UHF stations precludes these stations from reaching as many homes and viewers as their VHF counterparts. As a result,

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[4] For example, telephone companies are now permitted to provide video programming.

[5] See discussion contained in Section IB.

UHF stations tend to be consigned to relatively lower audience shares. For example, Fox realized significant audience declines when it switched from VHF to UHF affiliates in several major markets, such as Atlanta, Milwaukee and Cleveland.[6] In addition, identical programming shown simultaneously on a UHF and a VHF station consistently earns higher ratings on the VHF station.[7] Furthermore, attempts by UHF stations to achieve signal strength and quality comparable to that of in-market VHF stations necessitate costly equipment adjustments.[8] For example, a new UHF transmitter with increased power capabilities can cost as much as $900,000, and implementation of a power increase to achieve coverage comparable with VHF stations can increase UHF station power bills from $60,000 to $300,000 annually.[9] But even if a licensee has sufficient financing to pursue these adjustments, such technical fixes are not always possible or feasible. As a result, many UHF stations cannot compete on a level playing field with the VHF stations in their market.

Mandatory cable carriage of UHF signals has somewhat alleviated the signal propagation problems experienced by UHF stations; however, the constitutionality of these rules is currently being challenged in the U.S. Supreme Court. Since the continued viability

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[6] See comments filed by Tribune Broadcasting Company at 5, n.5, in MM Docket No. 91-221, Further Notice of Proposed Rulemaking.

[7] See comments filed by the Association of Independent Television Stations, Inc., MM Docket No. 94-123 (filed March 7, 1995) at Exhibit 2.

[8] See comments filed by Silver King in the Further Notice at 9-11.

[9] See BROADCASTING & CABLE, "*Public TV Solution Not As Simple as V's, U's - VHF stations Selling Channels to UHF,*" *available in* LEXIS, FEDCOM Library, COMPUB File (April 3, 1995).

of these rules is in serious doubt,[10] the must carry rules realistically cannot be viewed as a perpetual means to equalize the UHF/VHF distinction. Thus, while there have been improvements in UHF signal propagation, a significant competitive disparity between UHF and VHF stations remains, and depending on the outcome of the litigation before the Supreme Court, this disparity may be exacerbated in the future. Further evidence of the handicap can be seen in the marketplace, which routinely assesses sale prices for UHF stations which are significantly lower than those for VHF stations in comparable markets.[11]

Given these various factors, it is clear that UHF stations experience certain financial and technical handicaps that VHF stations do not. As a result, common ownership of two UHF stations or a UHF/VHF station combination will not increase the potential audience share or market power as significantly as a VHF-VHF combination would. UHF combinations do not pose the same anti-competitive concerns as ownership of two VHF stations and should be permitted.

C. Creating a Duopoly Exemption for UHF-Based Stations Would Serve the Public Interest

Permitting UHF-UHF or UHF-VHF local station combinations also would benefit the public. In light of the technical, financial and operational handicaps faced by many UHF

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[10] See COMMUNICATIONS DAILY, *Cable Operators Told to Prepare for Near-Certain End of Must-Carry*, (December 16, 1996), *available in*, LEXIS, FEDCOM Library, COMPUB File.

[11] For instance, VHF Station WSTE-TV, Channel 7, Ponce, PR was purchased for $6,000,000 in 1991. In 1990, UHF Station WSJU-TV, Channel 18, San Juan, PR was purchased for $1,000,000. Similarly, in 1994, VHF Station KUTV(TV), Channel 2, Salt Lake City, UT (971,400 TV households, MSA Rank 44), was purchased for $100,000,000, while UHF Station KXLN-TV, Channel 45, Houston, TX (1,495,530 TV households, MSA Rank 7), was purchased for $20,000,000.

licensees, allowing common ownership of two UHF stations or a UHF-VHF combination in the same DMA will create stronger, more viable local competitors that are better able to invest in and develop programming services which ultimately will benefit the public. UHF-based combinations will become a lifeline to financially vulnerable stations by allowing them to establish economies of scale. The creation of these small economies of scale will permit the combined stations to reduce their operating costs by sharing some staffing, management, programming and other costs.[12] Some of these cost savings can be used to produce additional news and public affairs programming for the local community. As a result, permitting UHF-based ownership combinations will likely increase the diversity of programs and viewpoints offered by local UHF stations. It also will increase competition in the local markets by assuring the continued viability and competitiveness of UHF stations.

## II. WAIVERS OF THE DUOPOLY RULE SHOULD BE GRANTED WHERE THE APPLICANT CAN DEMONSTRATE THAT THE MARKET HAS A SUFFICIENT NUMBER OF INDEPENDENT COMPETING MEDIA VOICES AND THE PUBLIC INTEREST WILL BE SERVED

In the event that certain local television ownership combinations are not permitted by the television duopoly rule ultimately adopted by the Commission, the FCC requests comment on the criteria it should consider when evaluating individual waiver requests. The Commission proposes to permit joint ownership of television stations when the stations are in different DMAs and do not have overlapping Grade A contours. Although this change will relax the current restrictions, the FCC still intends to prohibit television broadcasters from

[12] In developing the local radio ownership rules, the Commission recognized the importance of preserving the weaker stations in the market. See Revision of Radio Rules and Policies, 7 F.C.C.Rcd. 6387, 6388 (1992).

owning more than one television station in a DMA. Notably, the rule change proposed by the FCC is intended to apply regardless of the actual competitive conditions in the local market and without regard to the level of consolidation among local broadcasters or other media. The Commission must acknowledge that there will be certain circumstances where a proposed combination is not permitted under the rule, but would nonetheless benefit the public without compromising either of the Commission's policy goals. Granite therefore urges the Commission to waive the television duopoly rule in circumstances where the requesting party can demonstrate that the consolidation will not substantially reduce the level of competition or diversity in the market and will provide a corresponding public benefit.

As explained in the preceding section, most markets contain a variety of media, including newspapers, cable, wireless cable, direct broadcast satellite service, as well as commercial and non-commercial radio and television entities. The largest markets offer such an extensive number and variety of media sources that a waiver would not diminish the diversity of programming or ownership offered in such a market. For example, certain DMAs may encompass several major cities which contain a myriad of independent competing media sources. A waiver of the television duopoly rule in such a situation will not significantly reduce either the economic competition or the diversity in the market. On the other hand, a less populated market may support a limited number of competing broadcast or other media outlets. Granting a waiver in such a situation could significantly reduce the diversity of voices and economic competition in the market and may be entirely inappropriate. The Commission should have the flexibility to distinguish these situations by examining the number of independent voices in a particular market and by granting waivers where a certain number of independent voices would remain after the television ownership consolidation.

Granite proposes that the Commission allow presumptive waivers of the television duopoly rule where there are at least 30 independent and competing media voices -- including non-broadcast voices -- in a market. The Commission has found in other contexts that the presence of thirty separately owned "voices" or licensees was a reliable indicator of diversity within a market. For example, in developing a radio-television cross-ownership waiver policy, the Commission stated that it will look favorably upon waiver applications involving radio and television station combinations in the top 25 markets, where there are at least 30 separately owned, operated and controlled broadcast licensees.[13] Paragraph 55 of the Second Notice confirms that "[t]he 30 independently owned voice test has proven effective in safeguarding [the Commission's] diversity and competition objectives in the Top 25 markets." Accordingly, the presence of thirty independent media in a market is sufficient evidence of a fully competitive and diverse market to allow for local television ownership consolidation.[14]

After establishing the presence of thirty independent media voices, the party seeking the waiver also must establish that the proposed combination would serve the public interest. The public interest benefits could be shown in a variety of ways. For example, the party could offer evidence that the combination would increase minority ownership. Alternatively,

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[13] See Amendment of Section 73.3555 of the Commissions Broadcast Multiple Ownership Rules, Memorandum Opinion and Order, 4 F.C.C. Rcd. 6489 (1989).

[14] The FCC may examine these conditions, however the Department of Justice and the Federal Trade Commission should assess the antitrust implications of station combinations.

the party could show that it would be able to increase its level of commitment to local news or local programming.

## III. CONCLUSION

The passage of the Act has opened a number of competitive opportunities for broadcasters. Granite strongly supports many of these liberalization efforts, including the proposed revisions to the television duopoly rule. However, in evaluating this proposal, Granite urges the Commission to craft a rule which recognizes the special situation of UHF-based stations. In addition to the adoption of a UHF exemption to the duopoly rule, Granite also urges the Commission to adopt a waiver standard which can, on a case-by-case basis, look beyond the strict application of the rule and assess the actual level of competition and diversity in the market.

Respectfully submitted,

GRANITE BROADCASTING CORPORATION

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Date: February 7, 1997

## CERTIFICATE OF SERVICE

I, Annamarie Valenti, an employee of Akin, Gump, Strauss, Hauer & Feld, L.L.P., certify that copies of the foregoing **COMMENTS OF GRANITE BROADCASTING CORPORATION** were sent via First Class Mail or by Hand Delivery on this 7th day of February 1997, to the following parties:

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